

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 13, 2007

MICHAEL MILTON VIA v. TERESA L. VIA

Appeal from the Circuit Court for Davidson County
No. 04D-1985 Carol Soloman, Judge

No. M2006-02002-COA-R3-CV - Filed on July 23, 2007

Husband and Wife were married in 1984. Husband served in the military for the duration of the marriage, retiring in 1995. The parties separated in 1998, and Husband filed for divorce in 2004. Wife, after being involved in a car accident several years earlier, receives Supplemental Security Income. The trial court awarded child support to Husband, the primary caretaker of the parties' minor child, based on Wife's potential earning capacity. Further, the trial court, by way of fairly convoluted calculations, awarded Wife only 12.5 percent of Husband's military pension. Wife appeals. We reverse the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Jean N. Crowe, Nashville, Tennessee, for the appellant, Teresa L. Via.

Appellee not represented on appeal.

OPINION

I. FACTUAL BACKGROUND

Teresa Via ("Wife") and Michael Via ("Husband") were married on November 26, 1984. The parties had a volatile marriage, and both attended domestic violence classes. Husband served in the military until his retirement in November of 2005, with the exception of approximately a year from 1991 to 1992. The parties separated in June of 1998. Husband filed for divorce in Circuit Court on August 2, 2004. The marriage produced two children, one of whom was still a minor at the time of the divorce. Husband has been the primary caretaker of the child since 1999. As Husband testified at the hearing, and Wife has never denied, Wife has sent nothing in the form of child support for either the parties' now emancipated child or the child who remains a minor and in

Husband's care. Similarly, Husband has sent only about \$500.00 to Wife since their 1998 separation.

In 1993, the parties' car collided with a crane train at a railroad crossing. According to Husband's testimony at the hearing, the train was traveling "15 to 20 miles an hour" when it struck the car and "drug us down the tracks about 30 to 40 feet." Wife, in the passenger seat at the time, received the brunt of the impact and sustained injuries resulting in mental instability. At the hearing, Wife's counsel asserted that Wife had an IQ of 55 and the mental capacity of a twelve-year-old. Due to her mental problems, Wife was awarded Supplemental Security Income ("SSI"). In a Uniform Civil Affidavit of Indigence filed on September 15, 2006, Wife noted that her sole source of income was a monthly SSI payment of \$603.00; she has not been employed since February of 2005.

Husband began receiving his military pension benefits upon his retirement in November of 2005. At the time of trial, Wife was still receiving benefits, both medical and otherwise, resulting from Husband's military service and pension. Further, according to the military's 20/20/20 plan, Wife was to continue receiving benefits following a divorce.¹

At the hearing, the parties informed the court that they had agreed on all but two terms of their divorce: (1) the division of Husband's military pension, and (2) whether Wife should pay child support. At the conclusion of the May 16, 2006 hearing, the court addressed the issues in the following manner:

Well, I want to award him some back child support. So, how do you-all suggest that I give her – from what I can determine she is entitled to a portion of the marital asset because she – for seven years she did not contribute in any way to the family, family assets, family upkeep, the family – the preservation of the family in any of the assets but she had the ability to do so. When I say, didn't contribute at all, that includes the children.

She owes – she's only entitled to the portion of the marital asset minus that time. Now, you also deduct the year he wasn't in the service and the years he was in

¹ An exhibit at the hearing explained Wife's benefit coverage as follows in relevant part:

Full Privileges - the "20/20/20" former spouse

Full benefits (medical, commissary, base exchange, theater, etc.) are extended to an unremarried former spouse when:

1. the parties had been married for at least 20 years;
2. the member performed at least 20 years of service creditable for retired pay; and
3. there was at least a 20 year overlap of the marriage and the military service.

the service before they were married^[2]. So, she is entitled to one-half of the 11 years. Now, from that she owes back child support of seven years. Yes, seven years.

So, in order to be equitable to both parties, I want to figure out what child support she owes and deduct it from the 11 years of the pension and the remainder will be what she receives.

....

And I have nothing before me that says she should not be working, nothing. She doesn't have the ability to earn as little as – 15 months ago she was earning money. There's no reason why she shouldn't be earning money now, therefore, she has the ability to make minimum wage for support of her children.

....

... This might or might not be correct but I'm going to take the six years and deduct it from the 11 years in which she's entitled to five years – one-half of five years on the pension taking the six years that she owes in child support because the child support would be much greater than any pension benefit she would receive.

So, she will get one-half of five years on the pension. I will set her child support for the one child, because the other child is emancipated, at minimum wage, whatever that is. . . . \$35,000.

The Final Order of Divorce, filed August 22, 2006, appears below in relevant part:

This cause came to be heard on the 16th day of May, 2006 before the Honorable Carol Soloman, Judge of the Eighth Circuit Court for Davidson County, Tennessee upon the complaint for absolute divorce filed on behalf of the Petitioner, Michael Milton Via and answer and counter-complaint filed on behalf of the Defendant, Teresa L. Via and based upon testimony of the Plaintiff, Michael Milton Via and witness and statements of counsel for the Plaintiff and the Defendant and upon statements of a partial agreement announced to the Court, the Court finds as follows and it is therefore, **ORDERED, ADJUDGED and DECREED:**

That both parties stipulate that if the Court were to hear proof as to grounds for divorce, that the Court would find that both parties would have grounds for divorce against the other and therefore, the parties shall be and are hereby declared divorced pursuant to Tenn. Code Ann. § 36-4-129.

....

That the parenting plan attached hereto as Exhibit A is approved and made an order of this Court as if stated herein verbatim.

That the Wife shall continue to be named as the beneficiary of the Husband's Survivor Benefit Plan of which Husband is entitled through his service and retirement from the military. Further, that the Wife shall pay the monthly amount owed to maintain said benefits in the amount of \$90.75. Further, any amount of

² While Wife asserts that Husband joined the military the same month they were married, Husband testified that he joined prior to the marriage, in August of 1983.

monthly pension benefits Wife may receive, there shall be deducted the amount of \$90.75 from Wife's portion of Husband's monthly pension benefits.

That the Wife is entitled to eleven (11) years of Husband's military pension benefits, however, the Court finds that the Wife owes the Husband child support arrears for the past six (6) years and that the amount of child support arrears owed by Wife to Husband, for the past six (6) years would be much greater than any pension benefit Wife would receive and therefore the Court finds that that [sic] the child support arrears owed by Wife to Husband for the past six (6) years shall be offset by six (6) years of the total eleven (11) years of Wife's entitlement to Husband's military pension and therefore Wife shall be awarded one-half (½) of five (5) years of Husband's military pension benefits.

In the attached parenting plan, Husband was given sole custody of the minor child, and Wife's contact with the child was limited to telephone calls. Also, Wife's gross monthly income was listed as \$892.66, and Wife was ordered to pay \$197.00 per month to Husband as child support.

Wife presents two issues on appeal: (1) whether, when Wife's income is SSI and the Tennessee Child Support Guidelines provide that SSI is not income for purposes of determining child support, the trial court erred when it imputed to Wife an income based on minimum wage and ordered that she pay both current and retroactive child support, and (2) whether, when the parties were married in excess of twenty-two years and when all twenty years of Husband's military career took place during the marriage, the trial court abused its discretion when it refused to divide Husband's military pension in equal portions as of the date of the Final Hearing for Divorce.

II. STANDARD OF REVIEW

This is a non-jury case and, accordingly, our review is de novo upon the record of the trial court without any presumption of correctness attaching to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn.1996) and Tenn. R.App. P. 13(d). We must, however, presume the trial court's factual finding to be correct absent evidence preponderating to the contrary. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn.1993).

Brummitte v. Lawson, 182 S.W.3d 320, 322 (Tenn.Ct.App.2005).

III. ANALYSIS

A. Child Support

Wife argues that SSI is not considered income for purposes of determining child support, and since SSI is Wife's sole income, the trial court abused its discretion in ordering her to pay child support. In support of such argument, Wife cites the Code of Federal Regulations regarding the determination of disability for Supplemental Security Income purposes, which states the following in relevant part:

§ 416.905 Basic definition of disability for adults.

(a) The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment(s) that makes you unable to do your past relevant work (see § 416.960(b)) or any other substantial gainful work that exists in the national economy. If your severe impairment(s) does not meet or medically equal a listing in appendix 1 to subpart P of part 404 of this chapter, we will assess your residual functional capacity as provided in §§ 416.920(e) and 416.945. (See § 416.920(g)(2) and 416.962 for an exception to this rule.) We will use this residual functional capacity assessment to determine if you can do your past relevant work. If we find that you cannot do your past relevant work, we will use the same residual functional capacity assessment and your vocational factors of age, education, and work experience to determine if you can do other work.

20 C.F.R. § 416.905 (2007).

Wife's argument is both well-founded and correct: SSI benefits are exempt from consideration when child support obligations are determined. *Tenn. Dep't of Human Serv. ex rel. Young v. Young*, 802 S.W.2d 594 (Tenn.1990); *State ex rel. Norfleet v. Dobbs*, No. 01A01-9805-CV-00228, 1999 WL 43260 (Tenn.Ct.App. Feb. 1, 1999); *State ex rel. Holder v. Holder*, No. 03A01-9105GS00156, 1991 WL 195068 (Tenn.Ct.App. Oct. 3, 1991); *Young v. Tenn. Dep't of Human Serv., ex rel. Young*, No. 03A01-9105CV00167, 1991 WL 195066 (Tenn.Ct.App. Oct. 3, 1991); Tenn. Comp. R. & Regs. R. 1240-2-4-.04(3)(c)(2)(iii) (2007).

However, it is clear from the hearing transcript that the trial judge based the child support award not on Wife's SSI benefits, but on Wife's ability to earn income.

The child support guidelines clearly state that the courts may not include in their calculation of a noncustodial parent's gross income benefits the parent is receiving from "means-tested public assistance programs . . . such as . . . Supplemental Security Income (SSI)." Tenn.Comp.R. & Regs. r. 1240-2-4-.03(3)(c)(1994). However, the child support guidelines also state with equal clarity that

If an obligor is willfully and voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, as evidenced by educational level and/or previous work experience.

Tenn.Comp.R. & Regs. r. 1240-2-4-.03(3)(d).

State ex rel. Norfleet, 1999 WL 43260, at *5.

The Tennessee Child Support Guidelines allow income to be imputed if a tribunal determines that the parent is willfully and/or voluntarily unemployed or underemployed, stating the following in relevant part:

(ii) Determination of Willful and/or Voluntary Underemployment or Unemployment. The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed. The purpose of the determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children.

(I) A determination of willful and/or voluntary under or unemployment is not limited to occupational choices motivated only by an intent to avoid or reduce the payment of child support. The determination may be based on any intentional choice or act that affects a parent's income.

(II) Once a parent that has been found to be willfully and/or voluntarily under or unemployed, additional income can be allocated to that parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes. The additional income allocated to the parent shall be determined using the following criteria:

- I. The parent's past and present employment; and
- II. The parent's education and training.

....

(iii) Factors to be Considered When Determining Willful and Voluntary Unemployment or Underemployment.

The following factors may be considered by a tribunal when making a determination of willful and voluntary underemployment or unemployment:

- (I) The parent's past and present employment;
- (II) The parent's education, training, and ability to work;

....

(VII) Any additional factors deemed relevant to the particular circumstances of the case.

Tenn. Comp. R. & Regs. R. 1240-2-4-.04 (2007). "Whether the obligor parent is willfully unemployed depends on the particular facts of each case. Such a determination is a question of fact, in which the trial court has considerable discretion." *Neiswinter v. Murray*, No. M2002-02345-COA-R3-CV, 2003 WL 23103967, at *7 (Tenn.Ct.App. Dec. 31, 2003) (citations omitted).

At the hearing on the matter, the trial court found that Wife had been employed following her car accident. Her most recent employment, as established by exhibit at the hearing, ended on

February 8, 2005. Further, at the hearing, the parties' adult daughter testified that following the accident, Wife worked at both a restaurant and a pharmacy.

However, as Appellant argues, the trial court made no direct finding of voluntary unemployment. In *Kelley v. Kelley*, No. M2004-01202-COA-R3-CV, 2005 WL 2240964 (Tenn.Ct.App. Sept. 15, 2005), this Court was faced with a similar situation. In a divorce action, the trial court determined the child support obligation by averaging three years of Father's income instead of his actual income. In doing so, this Court noted that "it appears to this Court that the trial court proceeded under Tenn. Comp. R. & Regs. R. 1240-2-4.03(3)(d) as if Mr. Kelley were voluntarily underemployed." *Kelley*, 2005 WL 240964, at *3. In reversing the trial court's determination, this Court stated :

In the absence of a written finding that Mr. Kelley was willfully underemployed, or that a deviation from the TSCG was otherwise warranted, under T.C.A. § 36-5-101(e)(1)(A), the trial court is obligated to base the child support award upon Mr. Kelley's actual income at the time of the hearing.

Kelley, 2005 WL 240964, at *4. No such written finding exists in the present case.

The trial court abused its discretion in imputing income to Wife based upon no finding of willful and/or voluntary unemployment or underemployment. The trial court's determination of Wife's apparent ability to earn minimum wage is based on inadequate evidentiary foundation. Wife was not even present to offer her testimony at the hearing, and the trial court's imputation of income based on the record is tenuous at best. Further, the trial court seemingly ignored the fact that the government, in accordance with 20 C.F.R. § 416.905, has determined that Wife suffers from "a severe impairment(s) that makes [her] unable to do [her] past relevant work or any other substantial gainful work that exists in the national economy." The trial court's child support obligation is reversed and remanded for further evidentiary exploration.

B. Military Pension

It is undisputed that Husband's military pension is marital property³, and should be divided between the parties. Wife argues that the trial court erroneously determined the amount of her entitlement to the pension.

³ Tennessee Code Annotated states the following in relevant part:

"Marital property" includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation, and the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage.

Tenn. Code Ann. § 36-4-121(b)(1)(B) (2007).

The trial court's calculations when dividing the pension are convoluted and unclear. As far as this Court can determine from the hearing transcript and the Final Order of Divorce, the trial court approached the division of the pension as follows: The parties had been married for twenty years when Husband filed for divorce, and Husband's military pension was fully vested at the time of the hearing. Apparently, the trial court accepted Husband's testimony that he joined the military in August of 1983, thereby deducting one year from Wife's share since the parties were not married until November of 1984. Further, the trial court declined to give Wife credit towards the pension for the seven years that the parties were separated. Therefore, Wife's share of the pension was reduced from twenty years to eleven years. After the reduction to eleven years, the trial court determined that Wife owed Husband six years worth of child support arrears for the years that Husband cared for the minor child, and deducted a further six years from Wife's share. As justification, the trial court stated that the amount of child support arrears would be much greater than any benefits Wife would have received from the pension. This reduction brought Wife's share down to five years. After dividing Wife's determined five year share, she was left with 2.5 years, or 12.5 percent, of the total twenty year pension.

Regarding the division of marital property, and the discretion allowed trial courts in so doing, this Court has stated:

Division of marital property must be equitable, not equal. T.C.A. § 36-4-121(a)(1) provides that the trial court may "... equitably divide, distribute or assign the marital property between the parties without regard to marital fault in proportions as the court deems just." The trial court has wide discretion in dividing the marital assets in order to best effectuate that purpose. "T.C.A. 36-825 [now 36-4-121] gives the court wide discretion to adjust and adjudicate the respective rights and interests of the parties in all jointly owned property. In the case of *Kittrell v. Kittrell*, 56 Tenn.App. 584, 409 S.W.2d 179, the court said the statute should be 'broadly construed and liberally applied to accomplish its objective.'" *Pennington v. Pennington*, 592 S.W.2d 576, 577 (Tenn.App.1979) (quoting *Evans v. Evans*, 558 S.W.2d 851, 854 (1977)). . . . T.C.A. § 36-4-121(D)(5) . . . provides: "The contribution of each party to the acquisition, preservation, appreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled his or her role. . . ."

Patric v. Patric, No. 03A01-9111-CH-00389, 1992 WL 32634, at *6 (Tenn.Ct.App. Feb. 25, 1992). Further,

Trial courts have wide latitude in fashioning an equitable division of marital property. *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn.1983). Their decisions must

be guided by the factors in Tenn.Code Ann. § 36-4-121(c)⁴, *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn.1988), and must be made without regard to marital fault. Tenn.Code Ann. § 36-4-121(a)(1); *Bowman v. Bowman*, 836 S.W.2d 563, 567-68 (Tenn.Ct.App.1991). The decision is not a mechanical one and is not rendered inequitable because it is not precisely equal, *Batson v. Batson*, 769 S.W.2d at 859, or because both parties did not receive a share of each piece of property. *Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn.Ct.App.1990). Appellate courts defer to the trial courts in these matters unless their decisions are inconsistent with the factors in Tenn.Code Ann. § 36-4-121(c) or are not supported by the preponderance of the evidence. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449-50 (Tenn.Ct.App.1991).

Brown v. Brown, 913 S.W.2d 163, 168-69 (Tenn.Ct.App.1994).

However, the trial court's meandering path in dividing the pension is too difficult to interpret. Further, the trial court made no attempt to explain any of the deductions behind the calculations. As this Court has stated:

In this case, our ability to attach the presumption of correctness to the trial court's decision has been hampered by the absence of any findings of fact and conclusions of law by the trial judge or any other explanation of the rationale used to achieve the final result. Other than a transcript of the proceedings, we are presented with a memorandum opinion and order which, without elaboration or explanation, grants the divorce to the husband, awards custody of the child to the wife, and divides the jointly held property. In a record containing material evidence adverse to the positions taken by each spouse, we will not make our decision by attempting to discern the reasons for the trial court's decision. Rather we will proceed to review the record de novo. Since the trial court made no findings of fact, there is

⁴ Tenn. Code Ann. § 36-4-121(c) states the following in relevant part:

(c) In making equitable division of marital property, the court shall consider all relevant factors including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
-
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
-
- (8) The economic circumstances of each party at the time the division of property is to become effective;
-
- (11) Such other factors as are necessary to consider the equities between the parties.

nothing in this record upon which the presumption of correctness contained in Tenn.R.App.P. 13(d) can attach.

Kelly v. Kelly, 679 S.W.2d 458, 460 (Tenn.Ct.App.1984).

If this Court did in fact interpret the trial court's calculations correctly, Wife was not given credit for the years that the parties were separated. This in itself is error, as anything other than a legal separation has no effect on the status of marital property until the final divorce. Tenn. Code Ann. § 36-4-121(b)(1)(A) states the following:

“Marital property” means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce, . . . and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date. In the case of a complaint for legal separation, the court may make a final disposition of the marital property either at the time of entering an order of legal separation or at the time of entering a final divorce decree, if any. . . . All marital property shall be valued as of a date as near as possible to the date of entry of the order finally dividing the marital property.

According to this statute, then, Wife is in fact entitled to the pension for the years that the parties were separated.

However, as this Court is provided with no guidance in understanding the trial court's calculations, another interpretation is possible. It seems that the trial court may have in fact given Wife credit towards the pension for the years of separation, but then cancelled out such credit since Wife was not providing Husband with child support during those same years, thereby circuitously awarding Husband retroactive child support. While retroactive child support is permitted by the Tennessee Child Support Guidelines, such retroactive support must be calculated correctly:

1240-2-4-.06 RETROACTIVE SUPPORT

(1) Unless the rebuttal provisions of Tennessee Code Annotated §§ 36-2-311(a)(11) or 36-5-101(e) have been established by clear and convincing evidence provided to the tribunal, then, in cases in which initial support is being set, a judgment must be entered to include an amount of monthly support due up to the date that an order for current support is entered:

....

(b) From the date:

1. Of separation of the parties in a divorce or in an annulment; or

....

(3) The retroactive support amount shall be calculated as follows:

(a) For the monthly BCSO, apply the Guidelines in effect at the time of the order, using the Child Support Worksheet. Use the average monthly income of both parents over the past two (2) years as the amount to be entered for “monthly gross income,” unless the tribunal finds that there is adequate evidence to support a different period of time for use in the calculation and makes such a finding in its order.

Tenn. Comp. R. & Regs. R. 1240-2-4-.06 (2007).

IV. CONCLUSION

There is an insufficient evidentiary basis in the record to support a finding that Appellant, presently drawing SSI benefits, is willfully and voluntarily underemployed. No finding by the trial court of such voluntary and willful underemployment appears in the record. The division of Appellee’s military retirement benefit is inequitable, particularly in the reduction of Wife’s benefit during the years the parties were separated without the benefit of court order and the further reduction by way of retroactive child support attributions, which are not supported by the evidence.

The judgment of the trial court is reversed and the case remanded to the trial court for such further proceedings as may be necessary.

WILLIAM B. CAIN, JUDGE